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Nos. 97-1927 and 98-83

In the Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,
Respondents.

CHARLES WILSON, GERALDINE WILSON, AND RACHEL SNOWDEN, NEXT FRIEND/MOTHER OF VALENCIA SNOWDEN, A MINOR,
Petitioners,

v.

HARRY LAYNE, JAMES A. OLIVIO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, AND BRIAN E. ROYNESTAD,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits

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BRIEF *AMICI CURIAE* OF ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS IN NO. 97-1927 AND RESPONDENTS IN NO. 98-83.

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BRIEF *AMICI CURIAE* OF ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS IN NO. 97-1927 AND RESPONDENTS IN NO. 98-83

INTEREST OF THE *AMICI CURIAE*[1]

Amici and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public by, among other means, observing public officials—including law enforcement officers—as they perform their governmental functions. *See* Appendix A *infra*. The decision below in *Berger v. Hanlon* effectively condemns this form of news reporting and, unless reversed by this Court, will impair the role of *amici* in "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

SUMMARY OF ARGUMENT

In *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), the Ninth Circuit has held that, for all practical purposes, the news media's presence during the execution of a search warrant is *per se* unreasonable and, therefore, a violation of the Fourth Amendment. In so holding, the Ninth Circuit has unnecessarily degraded the public's interest—long-recognized by this Court as one of constitutional dimension—in monitoring the work of its law enforcement institutions. By observing and recording first-hand the activities of government officials charged with enforcing the law, including the execution of search warrants, the news media afford the public a unique window through which to observe the conduct of those officials, the operation of the statutes and ordinances they enforce, and the social conditions they confront. If the *per se* rule embraced in *Berger*, and endorsed by the dissenters in *Wilson*

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief *amici curiae* has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.3(a).

v. Layne, 141 F.3d 111, 119 (4th Cir. 1998) (en banc) (Murnaghan, J., dissenting), is adopted by the Court, this window will effectively be closed.

To be sure, the search or seizure of a citizen's home, person, papers or other possessions by agents of the government may intrude substantially upon that citizen's privacy, and the consequences of the abuse of such power may be profound. Yet, the Ninth Circuit's *per se* rule would eliminate a most effective means by which the public may observe this invocation of governmental authority and thereby prepare itself to confront such abuses. A *per se* rule affords no weight at all to this important interest in striking the constitutional balance with the incremental diminution of privacy that may result from the news media's presence at a warrant's execution. Accordingly, this Court should reverse the judgment in *Berger*, affirm the judgment in *Wilson*, and decline to hold that law enforcement officers *necessarily and always* violate the Fourth Amendment by permitting the news media to observe and record their activities.

ARGUMENT

I. A RULE THAT IT IS UNREASONABLE *PER SE* TO PERMIT THE PRESS TO OBSERVE THE EXECUTION OF A SEARCH WARRANT WILL UNNECESSARILY DEPRIVE THE PUBLIC OF VALUABLE INFORMATION ABOUT THE FUNCTIONING OF ITS GOVERNMENT

In *Berger v. Hanlon*, the Ninth Circuit held that, although the search at issue there comported with the Constitution in all other respects, *see* 129 F.3d at 509, it nevertheless violated the Fourth Amendment because the news media accompanied and observed law enforcement officials as they executed a warrant, *see id.* at 510-11.[2] In contrast, five members of the *en banc* majority in

[2] *See also Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that "an objectively reasonable officer could not have concluded

Wilson v. Layne determined that "reasonable law enforcement officers might conclude" that permitting newspaper reporters "to observe and photographically record the execution of an arrest warrant" would serve, *inter alia,* the salutary purpose of "facilitating accurate reporting that improves public oversight of law-enforcement activities." 141 F.3d at 116.[3]

The Ninth Circuit's holding, if adopted by this Court, will have one certain consequence: To avoid the risk that they will be deemed to have violated the Fourth Amendment, law enforcement and other public officials performing their duties will simply bar the public, through the news media, from observing their activities in a variety of settings. Such a regime will eliminate a class of news reporting that has contributed meaningfully to public scrutiny of official conduct. First-hand observations by the public, through the news media, of law enforcement searches and seizures—ranging from police raids on "crack houses," to inspections by fire marshals of overcrowded sweat shops, to health department examinations of roach-infested restaurant kitchens—provide the public with a

that inviting a television crew—or any third party not providing assistance to law enforcement—to participate in a search was in accordance with Fourth Amendment requirements"); *Hagler v. Philadelphia Newspapers, Inc.*, 24 Media L. Rep. (BNA) 2332, 2334 (E.D. Pa. July 12, 1996) (adopting and quoting reasoning in *Ayeni*); *but see Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing *Ayeni* for its "failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

[3] *See also Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (concluding that it is not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a warrant"), *cert. denied*, 117 S. Ct. 1081 (1997); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (where warrant made no mention of news media but authorized police to videotape search, subject's rights were not violated when police invited news media along and permitted them to make their own videotape of search).

rare opportunity to monitor and evaluate the conduct of these officials.[4] Such reporting informs the public, in a way no other kind of journalism realistically can, about the assertedly unlawful conduct at which enforcement efforts are directed,[5] the difficulties and dangers facing law enforcement officers,[6] the legal restrictions that confine their discretion, and the social ills they seek to redress.[7]

This Court has repeatedly recognized that our constitutional democracy presupposes and, indeed, requires an informed public. As the Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v.*

[4] *See, e.g., ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994) (observing work of detective squad for one month as means of reporting on ability of police to solve murders); *CBS News Special: 48 Hours on Crack Street* (CBS television broadcast, Sept. 2, 1986) (observing law enforcement officers during two-day period to document how they grapple with "crack" cocaine problem).

[5] *See, e.g., Prime Time Live: Sorry, Wrong Number* (ABC television broadcast, Sept. 25, 1996) (observation of state and federal agents investigating scheme involving cell phones programmed with stolen identification numbers and methods for consumers to avoid them).

[6] *See, e.g.*, Gordon Dillow, *Fuhrman's Fallout Makes Streets That Much Meaner For LAPD*, Orange County Register, Sept. 10, 1995, at A1 (reporter who accompanied policeman on duty documented reactions of citizens to law enforcement officers); Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1 (reporter who accompanied police on execution of arrest warrant documented obstacles to location and apprehension of sex offenders).

[7] *See, e.g., CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993) (CNN journalists who accompanied law enforcement officers on raids of sweat shops documented illegal conditions to which unskilled laborers were subjected).

Bellotti, 435 U.S. 765, 783 (1978). "In a variety of contexts, this Court has referred to a First Amendment right to 'receive information and ideas.' " *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). To secure that right, the American public "relies necessarily upon the press" to inform it about the conduct of government. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

News reporting about the operations of government officials charged with administering the law provides both a catalyst and the raw material for the " 'free discussion of governmental affairs.' " *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The *per se* rule adopted by the Ninth Circuit and embraced by the dissenters in *Wilson* would effectively eliminate an important journalistic tool and reduce the stock of information necessary "to ensure that the individual citizen can effectively participate in . . . our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604. Such a result, this Court has emphasized, will inevitably breed unnecessary distrust. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (Burger, C.J., announcing judgment).

II. A *PER SE* RULE IGNORES THE COURTS' CONSTITUTIONAL OBLIGATION TO BALANCE COMPETING INTERESTS, INCLUDING THE PUBLIC'S NEED TO INFORM ITSELF ABOUT THE CONDUCT OF LAW ENFORCEMENT OFFICIALS

The Fourth Amendment prohibits " 'not all searches and seizures,' " but only those that are " 'unreasonable.' " *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted). Ultimately, what is "reasonable" for Fourth Amendment purposes "depends 'on a balance between the public interest and the individual's right to personal security free from

arbitrary interference by law officers.' " *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (citation omitted). This Court has cautioned that "[t]he test of reasonableness cannot be stated in absolute terms. 'Each case is to be decided on its own facts and circumstances.' " *Harris v. United States*, 331 U.S. 145, 150 (1947) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)), *overruled in part on other grounds, Chimel v. California*, 395 U.S. 752 (1969); *see also Wilson v. Arkansas*, 514 U.S. 927 (1995).

Similarly, this Court has assessed with skepticism rigid rules that restrict the free flow of information about the workings of government and its officials in the name of personal privacy. In *Globe Newspaper Co. v. Superior Court*, for example, the Court rejected a *"mandatory* closure rule" applicable to the trial testimony of minor victims of sexual assaults. 457 U.S. at 607-08 (emphasis in original). Although the Court acknowledged that the rule's purpose—"safeguarding the physical and psychological well-being of a minor—is a compelling one," it added that "it is clear that the circumstances of the particular case may affect the significance of the interest." *Id.* (footnote omitted). As the Court explained, "[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608. Thus, contrary to the reasoning of the *Berger* panel and the *Wilson* dissenters, privacy interests protected by the Fourth Amendment do not demand a rule that the news media's presence during the execution of a warrant is *always* unreasonable, and First Amendment considerations as well counsel that the courts should determine the issue in light of " 'all the circumstances.' " *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997) (citation omitted).

At bottom, the Fourth Amendment is directed against the exercise of unchecked *governmental* power. *United States v. Place*, 462 U.S. 696, 706-07 (1983). The *per se* rule endorsed by the Ninth Circuit would, in many

circumstances, eliminate the only means by which the press and public can monitor abuses of that power first-hand. Concededly, media representatives are typically permitted to observe searches and seizures only at the sufferance of law enforcement officials. Even this limited opportunity for oversight—undertaken in a manner otherwise consistent with the dictates of the Fourth Amendment—is preferable to the alternative endorsed by the *Berger* panel and the *Wilson* dissenters: no possibility of any oversight at all. The information obtained by the American public from first-hand news accounts of law enforcement activity expands the base of knowledge upon which the public can evaluate claims of official impropriety. *See Wilson v. Layne*, 141 F.3d at 116 (noting reasonableness of proposition that, as a general matter, media observation and recording of execution of warrants "deters . . . improper conduct by law enforcement officers"). As this Court has observed on countless occasions, " '[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.' " *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment) (quoting J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

Amici do not contend that the presence of news media representatives during the execution of a warant is *never* relevant to whether a Fourth Amendment violation has occurred.[8] Nevertheless, for the foregoing reasons, a rule

[8] For example, in contrast to the cases now before the Court, in *Ayeni v. Mottola*, the Second Circuit found that six government agents without a warrant "pushed" their way into an apartment past a night-gown clad woman and a small child and began searching bedroom closets for evidence of credit card fraud allegedly perpetrated by the woman's husband, who was not present. 35 F.3d at 683. Some time later, four more agents armed with a warrant arrived, accompanied by a camera crew. The court found that Mrs. Ayeni objected to the presence of the camera and, when she tried to shield her son's face with a magazine, a government agent snatched it out of her hand and told her to "shut up." *Id.* According to the Second Circuit, one of the government agents then "directed" the camera crew to videotape Mrs. Ayeni's face while she was being interrogated and the cameraman complied. *Id.* Significantly, in neither of the cases before this Court did the news media permit their staff or equipment to be "directed" by government agents.

that such activities *always* violate the Fourth Amendment is neither constitutionally required nor justified. The mere observation and recording of a search by the news media, and subsequent public dissemination of what was observed, should not—without more—constitute a violation of the Fourth Amendment.[9]

[9] Even under those circumstances in which the Constitution does not preclude law enforcement officials from authorizing the news media to accompany them while executing a warrant, an aggrieved citizen remains free to assert whatever protections may be available under state tort law, including—in appropriate circumstances—causes of action for trespass or invasion of privacy. *See, e.g., Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Ct. App. 1986) (permitting trespass and invasion of privacy claims against reporter who accompanied paramedics into private home during emergency medical call); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981) (permitting trespass claim against reporters who accompanied investigator as he executed search warrant); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (reinstating claim for trespass against reporter who accompanied law enforcement officers into private home during arrest); *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976) (observing that, in absence of consent, person injured by news media's entry into home with officials following fatal fire could maintain claims for trespass and invasion of privacy, but finding implied consent from evidence at issue in case); *see also* 28 U.S.C. § 2679(b)(1) (providing that persons whose property has been injured or lost, or who have suffered personal injury as result of negligent or wrongful act of federal employee may bring damage claim against United States). Indeed, the Ninth Circuit remanded for further proceedings the trespass claims asserted in *Berger v. Hanlon*, an aspect of its decision that is not before this Court for review. *See* 129 F.3d at 517.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment in No. 97-1927 be reversed and that the judgment in No. 98-83 be affirmed.

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APPENDIX

APPENDIX A

IDENTITY OF INDIVIDUAL *AMICI CURIAE*

ABC, Inc., an indirect wholly-owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It alone, or through its subsidiaries, owns the ABC Television Network, ten television stations and 34 radio stations.

A.H. Belo Corporation, a publicly-traded (NYSE) company, has numerous wholly-owned subsidiaries, including subsidiaries which operate the *Riverside Press-Enterprise* newspaper in Riverside, California, and KXTV in Sacramento, California; KING-TV in Seattle and KREM-TV in Spokane, Washington; and KGW-TV in Portland, Oregon.

Allied Daily Newspapers of Washington, Inc. ("Allied") is a Washington nonprofit corporation owned and operated by the 25 daily newspapers in the State of Washington, including all traditional, daily newspapers of general circulation. Allied's offices are located in Olympia, Washington. One of Allied's primary purposes is to monitor media law and join in briefs on behalf of members in courts or before administrative agencies.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded over seventy-five years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate re-

ports of the affairs of government—be they executive, legislative, or judicial.

The Associated Press ("AP"), a not-for-profit mutual news cooperative organized under the New York Not-For-Profit Corporation Law, is headquartered in New York City. The members of AP are newspapers, television stations and radio stations. Founded in 1848, and now the oldest and largest newsgathering organization in the world, AP engages in the collection of news from and distribution of news to its members.

The California Newspaper Publishers Association ("CNPA") represents approximately 500 daily and weekly newspaper members and for over 100 years has stood for the right of every individual to participate in the constitutional guarantee of freedom of expression.

CBS Broadcasting Inc., a New York corporation, is engaged in the business of producing and broadcasting nationally news and public affairs programming, and operating television and radio stations.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and other newspapers in California and Illinois, whose combined daily circulation exceeds 750,000 copies. Copley's newspapers range from a small desert semi-weekly to a large metropolitan daily, all of which serve readers intensely interested in the conduct of law enforcement agencies.

Dow Jones & Co., Inc., is the publisher, *inter alia,* of *The Wall Street Journal,* a national newspaper published each business day, the Dow Jones Financial News Services, real-time, 24-hour newswires distributed electronically to subscribers, *Barron's,* a weekly newspaper of business and finance, and, through its Ottaway Newspaper, Inc. subsidiary, 19 daily and 18 weekly newspapers.

Fox Television Stations, Inc. owns and operates 22 television stations in major markets, including KTTV in

Los Angeles. Twenty-one of the Fox television stations broadcast local news and news-related programs several times daily, which are an integral part of their schedule.

Gannett Co., Inc. is a nationwide news and information company that operates 21 television stations, which broadcast to over 16% of the U.S. Publishing 75 daily newspapers, including *USA Today*, Gannett is the nation's largest newspaper group in terms of circulation. In addition, Gannett owns a number of non-daily publications, including *USA Weekend,* a newspaper magazine, and a national wire service.

The Hearst Corporation is a diversified privately held communications company that publishes newspapers, consumer magazines, books and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

King World Productions, Inc. is a leading worldwide distributor of television programming. King World produces and distributes the daily television news program "Inside Edition," which is broadcast by television stations located throughout the United States.

The Los Angeles Times is the nation's largest daily metropolitan newspaper with a circulation of more than 1,095,000 daily and 1,385,000 on Sunday.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 1200 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature,

religion, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The McClatchy Company publishes 11 daily newspapers and 13 community newspapers in California, Washington, Alaska, Minnesota, North Carolina and South Carolina, including *The Sacramento Bee, The News Tribune* in Tacoma, the *Anchorage Daily News,* the *Star Tribune* in Minneapolis, *The News & Observer* in Raleigh, and *The Herald* in Rock Hill. The newspapers have a combined average paid circulation of 1,364,000 daily and 1,855,000 Sunday.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

National Broadcasting Company, Inc. ("NBC") operates a national television network of more than 200 affiliates and 13 owned-and-operated stations that broadcast its programming throughout the United States. NBC reports on matters of general public concern through its Network News Division (which produces, among other programming, *Nightly News with Tom Brokaw, Today,* and *Dateline NBC*) as well as its cable news networks, MSNBC and CNBC.

The Newspaper Association of America, Inc. ("NAA") is a nonprofit organization representing the interests of more than 1,700 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately 87 percent of the U.S. daily newspaper circulation. One of NAA's key strategic priorities is to advocate and support newspapers' First Amend-

ment interests, including the ability to gather and report news and information of public concern.

The New York Times Company publishes *The New York Times, The Boston Globe* and 21 other newspapers. The Company also owns eight television stations and a number of sports magazines.

The Orange County Register, a division of Freedom Communications, Inc., publishes a daily newspaper in Santa Ana, California, with a circulation of more than 350,000.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedom case that has been litigated in the United States since 1970.

Tribune Company is a diversified news, information and entertainment company based in Chicago. Among other things, it operates sixteen television stations, four radio stations and a regional cable news service, it publishes four daily newspapers, and produces nationally-syndicated radio and television programs.

Univision Communications Inc. is the leading Spanish language television broadcaster in the United States. Univision owns and operates 13 full power stations in major markets, including Los Angeles, San Francisco, New York, Chicago and Miami. In addition, Univision owns and operates eight low power stations. More than two-thirds of Hispanics in the United States speak Spanish in the home. News broadcasts are a vital component of Univision's overall television programming and it is expected that Univision will continue to be the leading source of news for Hispanic Americans.

The Washington Post, a daily newspaper of general circulation primarily in Virginia, Maryland and Washington, D.C., is a division of The Washington Post Company, a communications company that owns publications and broadcast properties engaged in newsgathering and reporting.

The Washington State Association of Broadcasters represents all of the radio and television stations licensed to communities within the State of Washington. The Association represents broadcasters' news reporters on issues relating to their ability to report on issues of public importance. An adverse ruling in this case would significantly impair the ability of news reporters of broadcast stations in Washington State to cover issues surrounding effective law enforcement within their communities. Law enforcement activities constitute a substantial portion of the news covered by broadcast journalists in Washington and, as such, these issues are likely to arise on a continuing basis.